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Amicus Curiae Observations by Public International Law & Policy Group

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THE APPEALS CHAMBER

Before: **Judge Luz del Carmen Ibáñez Carranza, Presiding**
Judge Piotr Hofmański
Judge Solomy Balungi Bossa
Judge Reine Alapini-Gansou
Judge Gocha Lordkipanidze

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

Public Document

***Amicus Curiae* Observations by Public International Law & Policy Group**

Source: Public International Law & Policy Group

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1. The Public International Law & Policy Group ("**PILPG**") offers the following *amicus curiae* observations pursuant to the Decision No. ICC-02/04-01/15-1914. PILPG welcomes the opportunity to appear in person before the Appeals Chamber. PILPG Co-Founders Dr. Paul R. Williams and Dean Michael P. Scharf; Managing Director Prof. Milena Sterio; Executive Director Dr. Gregory P. Noone; Senior Legal Advisors Dr. Yvonne Dutton, Adrienne Fricke, and Jonathan Worboys; Senior Peace Fellows Gregory Townsend and Jennifer Trahan; as well as Chihiro Isozaki, Greta Ramelli, Sindija Bēta, Laura Hamilton, Alexandra Koch, Isabela Karibjanian, and Kendahl Tyburski contributed to these observations.

I. Under arts. 66(2) and 67(1)(i) of the Rome Statute, once the accused raises sufficient evidence[1] to establish the existence of mental disease or defect or duress in accordance with art. 31(1)(a) or (d) of the Rome Statute and rule 79(1)(b) of the Rules of Procedure and Evidence ("RPE"), the Prosecution thereafter bears the burden to prove that the evidence adduced by the accused in relation to the art. 31 ground does not establish a reasonable doubt as to the accused's guilt

2. The identified legal issue[2] concerns the allocation of the burden of proof and the appropriate legal standard of proof in relation to the applicability of the grounds excluding criminal responsibility enshrined in art. 31(1)(a) and (d) of the Rome Statute. This brief defines "burden of proof" as the obligation on a party to prove the fact in issue[3] and "standard of proof" as the degree to which a party must prove its case to succeed.

3. With regard to grounds excluding criminal responsibility, there is no specific provision in the Statute regulating the burden of proof and standard of proof and the question is not governed by general principles of international law.[4] The courts of national and international jurisdictions

[1] Rule 79(1)(b) does not specify how much evidence that the accused must provide. In jurisdictions that apply the Evidentiary Production Approach, the threshold is low, comparable to a prima facie showing.

[2] Prosecutor v. Dominic Ongwen, No. ICC-02/04-01/15 A, Appeals Chamber Order inviting expressions of interest as amici curiae in judicial proceedings, ¶ 10(iii) (Oct. 25, 20221).

[3] In some courts and jurisdictions, burden of proof is sometimes referred to as the "legal" or "persuasive" burden, as distinguished from the "evidentiary" or "evidential" burden. The former refers to the burden of persuading the jury as to the guilt or innocence of the accused, or a fact essential to the determination of an accused's guilt or innocence. R v. DPP, ex parte Kebilene (2000) 2 AC 326, 378 ¶ H. The "evidentiary" or "evidential" burden, in contrast, refers to the burden of introducing evidence in support of a party's case. It "requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case." Other tribunals have indicated discomfort with the term "burden of proof" with respect to evaluative assessments, such as in the issue of mental disease and defect, choosing instead terms such as "persuasive burden" or "onus." *E.g.,* DJ, R (on the application of) v. Mental Health Review Tribunal (2005) EWHC (Admin) 587 [105]. However, PILPG will use the term "burden of proof" throughout the present brief, to remain consistent with the ICC's terminology.

[4] Consistent with its definition in art. 21(1) Rome Statute. *See* discussion at paras. 22–25 below.

remain split on the issue, suggesting that the Appeals Chamber may take one of three approaches: (1) place both the evidentiary burden and the burden of proof on the accused to prove the existence of the grounds of mental disease or defect or duress ("Burden Shifting Approach");[5] (2) place an obligation of initial evidentiary production with respect to a defence of mental disease or defect or duress on the accused, thereafter maintaining the burden on the Prosecution to prove that the evidence brought forward by the accused does not raise a reasonable doubt about the accused's culpability ("Evidentiary Production Approach"); (3) allow all parties to submit evidence and require the judges to ultimately make a determination without any presumption in favour of the Prosecution or accused, not placing the burden of proof on either the accused or the Prosecution as to affirmative defences ("Free Assessment Approach").[6]

4. The Appeals Chamber should find the Evidentiary Production Approach most appropriate, according to which an accused who seeks to benefit from an art. 31 ground for excluding criminal responsibility must adduce sufficient evidence to establish its existence, in accordance with rule 79(1)(b). Upon the accused producing sufficient evidence, the art. 31 ground becomes a relevant, live issue before the Trial Chamber, which it must decide in its judgment. In order to secure a conviction, the Prosecution must prove that the evidence adduced does not raise a reasonable doubt as to the guilt of the accused.

5. The Free Assessment Approach is not advocated for in this amicus brief because it is incompatible with the intent of the drafters of the ICC. The Free Assessment Approach is unique to the inquisitorial model of civil law jurisdictions. Following the ICTY approach, the drafters adopted a largely adversarial model for trials.[7] Rule 79(1)(b) of the RPE was thus intended as an adversarial provision, in which the Prosecution would be required to prove the case. Moreover, the Free Assessment Approach does not comply with arts. 66 and 67(1)(i) of the Rome Statute in that it does not place the entire burden of proof on the Prosecution.

[5] This approach combines approaches 1 and 2 in PILPG's Request for Leave, which distinguished between different standards of proof imposed on the accused. For instance, the ICTY and several national jurisdictions, primarily common law, requires the accused to prove the defence of insanity or duress by a "balance of the probabilities," distinguished from the higher standard of proof placed on the Prosecution with respect to the elements of a crime—i.e., "beyond a reasonable doubt." *E.g.*, Prosecutor v. Delalic (Celebici), Case No. IT-96-21, Trial Chamber Judgement (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); English Homicide Act 1957, 5 & 6 Eliz. 2 c. 11 § 2.

[6] Many civil law jurisdictions employ this approach. *See, e.g.*, Austria, Greece, and Cyprus discussed in Section IV.

[7] In drafting their Rules of Evidence and Procedure, the ICTY Judges adopted a largely adversarial approach, rather than the inquisitorial approach. *See* Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 Am. J. Comp. Law 835, 837 (2005); VIRGINIA MORRIS & MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA VOL. I 158, 181 (1994) (explaining why the ICTY adopted an adversarial approach rather than an inquisitorial one for its investigations and trials).

6. In support of its submission, PILPG relies on the hierarchy of sources established in art. 21(1) of the Rome Statute. Art. 21(1) provides that the Appeals Chamber shall first apply the Rome Statute and RPE,[8] followed by the applicable treaties and rules of international law,[9] and then the general principles derived by the national laws of legal systems.[10]

II. Arts. 66 and 67(1)(i) of the Rome Statute and rule 79(1)(b) of the RPE, which regulate the allocation of the burden of proof and the evidentiary burden, compel the Evidentiary Production Approach

7. In compliance with art. 21(1)(a) of the Rome Statute, the Appeals Chamber should first apply the Rome Statute and the RPE to determine the allocation of the burden of proof. The relevant applicable law is arts. 66 and 67(1)(i) of the Rome Statute (allocation of burden of proof) and rule 79(1)(b) of the RPE (disclosure of evidence under art. 31). Read together, the plain language of these provisions support the Evidentiary Production Approach, as a corollary to the maxim of the presumption of innocence set forth in art. 66, according to which "everybody must be presumed innocent until proven guilty according to the law."

8. Arts. 66(2)–(3) establish that the Prosecution bears the burden to prove the guilt of the accused and that the appropriate standard of proof to establish such guilt is "beyond reasonable doubt."[11] Art. 67(1)(i) specifies the right of the accused not to have imposed any reversal of the burden of proof or any onus of rebuttal.[12] Accordingly, the burden of proof remains with the Prosecution at all times, including in respect of the invocation of mental disease or defect or duress, as provided in art. 31 of the Rome Statute. The combined effect of arts. 66(2)–(3) and 67(1)(i) creates a prohibition against allocating any burden of proof on the accused, indicating that the interpretation of the presumption of innocence in the Rome Statute, pursuant to arts. 66 and 67, goes beyond minimum human rights norms.[13]

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[8] International Criminal Court [hereinafter, "ICC"], Rules of Procedure and Evidence, *adopted* Sep. 3–10, 2002, art. 21(1)(a), ICC-ASP/1/3 [hereinafter, RPE].
[9] RPE, art. 21(1)(b).
[10] RPE, art. 21(1)(c). *See* Section V, on "general principles."
[11] Defined in this brief as "the degree to which a party must prove its case to succeed." *See* Rome Statute of the ICC, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter, Rome Statute], art. 66(2).
[12] Rome Statute, art. 67(1)(i) (emphasis added). *See* Mark Klamberg, Commentary on the Law of the ICC 482 (2017). *See also* Prosecutor v. Bemba, Case Nos. ICC-01/05-01/08-2490-Red & ICC-01/05-01/08-2497, ICC-01/05-01/08-2500, Trial Chamber III Judgement, ¶ 19 (Feb. 6, 2013).
[13] *E.g.*, the European Convention of Human Rights allows for reversals of the burden of proof within clear limits. *See* William A. Schabas, *Article 66 – Presumption of Innocence*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE, 833–43 (OTTO TRIFFTERER ED., 1999).

9. The plain language of rule 79(1)(b) establishes that when relying on a ground excluding criminal responsibility in art. 31(1), an accused has an evidentiary obligation: the accused is required to raise[14] a ground for excluding criminal responsibility and specify the names of witnesses and evidence they intend to rely on to establish the ground.[15] This interpretation conforms to the prohibition of reversal of the burden of proof laid out in arts. 66(2)–(3) and 67(1)(i).

10. Read together, arts. 66(2)–(3) and 67(1)(i) and rule 79(1)(b) support the Evidentiary Production Approach. Once the accused raises a mental disease or defect or duress defence provided for in art. 31(1), they must produce evidence to support that ground. The Prosecution thereafter bears the burden to prove that the evidence adduced by the accused in relation to the art. 31 ground does not establish a reasonable doubt as to the guilt of the accused.

III. The negotiating record of the Rome Statute indicates that the drafters intentionally rejected the Burden Shifting Approach and confirms the above interpretation of arts. 66(2)–(3), 67(1)(i) and rule 79(1)(b) of the RPE

11. Section II demonstrated that the language of arts. 66 and 67(1)(i), in conjunction with rule 79(1)(b), substantiate the Evidentiary Production Approach. To confirm the plain meaning of art. 67(1)(i), the Appeals Chamber may examine the applicable treaties and rules of international law, as specified in art. 21(1)(b).

12. In accordance with art. 32 of the Vienna Convention, the Appeals Chamber should interpret art. 67(1)(i) in the light of the negotiating history of the Rome Statute, and in particular, the preparatory work related to its articles on burden of proof (arts. 66 and 67(1)(i)).[16]

13. The negotiating record of the Rome Statute establishes that the lack of a specific provision in the Rome Statute regulating the burden and standard of proof with respect to art. 31 grounds is not a lacuna; the drafters intended arts. 66 and 67(1)(i) to apply equally to affirmative defences. The

See also WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE, 784–85 (2010).

[14] *Raise*, Black's Law Dictionary (11th ed., 2019) ("To bring up for discussion or consideration; to introduce or put forward <the party raised the issue in its pleading>.").

[15] RPE, rule 79(1)(b). *See also* Rosalynd C. E. Roberts, *The Lubanga Trial Chamber's Assessment of Evidence in Light of the Accused's Right to the Presumption of Innocence*, 10 J. Int. Crim. Justice, 928 (2012).

[16] The Vienna Convention on the Law of Treaties, which the ICJ has concluded reflects customary international law, *see* Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgement, 1997 I.C.J. Rep., 38, ¶ 46 (Sep. 25), establishes comprehensive rules and principles regarding the interpretation of treaties. Art. 32 of the Convention provides that, when interpreting a treaty, "recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, art. 32.

negotiating history of the Rome Statute further demonstrates that the drafters intentionally rejected the Burden Shifting Approach.

14. The first time the issue of burden of proof was raised in the preparatory work dates back to a 1996 proposal by Israel to include section (5) *bis* in art. 44: "With regard to defences open to the accused under the general principles of criminal law in this Statute, the onus of proof shall be on the accused, subject to a preponderance of probability as applicable in civil cases."[17] In August 1997, the Working Group on Procedural Matters recommended adding the following under art. 41 (rights of the accused): "[(j) no reverse onus or duty of rebuttal shall be imposed on the accused]."[18] In December 1997, the Working Group included Israel's proposal under art. 44 in bracketed language[19] and in February 1998, the Working Group's August 1997 proposal prohibiting the reversal of onus or duty of rebuttal was included in art. 60(1) (formerly art. 41).[20]

15. As a result, in April 1998, the draft statute included both art. 60(1) (formerly art. 41) prohibiting the reversal of the burden of proof,[21] and art. 62(5) (formerly art. 44(5) *bis*) placing, with regard to affirmative defences, the burden of proof on the accused subject to a preponderance of probability.[22] In a subsequent draft in April 1998, art. 60(1) (rights of the accused) was replaced by art. 67(1)(j)[23] and art. 62(5) (evidence) was replaced by art. 69(7) maintaining the same language.[24]

[17] Preparatory Committee on the Establishment of an ICC [hereinafter, "ICC PrepCom"], *Report*, A/51/22, Vol. II , at 221 (Sep. 13, 1996). *See also Proposal Submitted By Israel For Articles 44, 45 & 47*, A/AC.249/WP.53 (Aug. 29, 1996).

[18] ICC PrepCom, *Decisions Taken by the Committee*, A/AC.249/1997/L.8/Rev.1, at 35 (Aug. 14, 1997).

[19] The Working Group noted that this provision "might be better placed under art. 40 [currently art. 66] or in the context of "Defences" in the part dealing with general principles of criminal law." ICC PrepCom, A/AC.249/1997/L.9/Rev.1, at 31 (Aug. 14, 1997). The documents on the legislative history do not reflect any discussion on this question.

[20] ICC PrepCom, *Report of the Intersessional Meeting*, A/AC.249/1998/L.13, at 115 (Feb. 4, 1998).

[21] ICC PrepCom, *Text of the Draft Statute for the International Criminal Court*, Part 6 The Trial, A/AC.29/1998/CRP.12, at 10 (Apr. 1, 1998).

[22] In relation to art. 62(5), the ICC PrepCom maintained a similar recommendation to the one made in 1997: "such a provision might better be discussed in the context of arts. 59 [40], 60 [41] or 25 [L]." ICC PrepCom, *Text of the Draft Statute for the International Criminal Court*, Part 6 The Trial, A/AC.29/1998/CRP.12, at 13 (Apr. 1, 1998).

[23] ICC PrepCom, Addendum, A/CONF. 183/2/Add.1, at 107 (Apr. 14, 1998).

[24] This new draft maintained the recommendation that the provision might be better discussed in the context of art. 66 (presumption of innocence), 67 (rights of the accused), or 31 (grounds for excluding criminal responsibility). ICC PrepCom, Addendum, A/CONF. 183/2/Add.1, at 110 (Apr. 14, 1998). *See also* United Nations, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Vol. III, A/CONF.183/13, at 56–58 (Jun 15–Jul. 17, 1998). Only art. 67 (right of the accused) reflects a discussion on this.

16. In June 1998, the discussion on the scope of art. 69(7) continued: Colombia,[25] Canada,[26] Iraq,[27] and the Philippines[28] proposed alternative texts to the one recommended by Israel in 1996.[29] Iraq noted that its proposal, largely reflecting Israel's language and in support of the Burden Shifting Approach, would require the deletion of art. 66(2) "The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt,"[30] because the two provisions were mutually exclusive.

17. In the July 1998 draft proposal, art. 67(1)(j) was replaced by art. 67(1)(i), including the following revised text: "not to have imposed on him any reverse onus or duty of rebuttal." The Working Group made no reference in the text to the proposed language for art. 69.[31] Later in July, the text of art. 67(1)(i) was further revised to include an explicit reference to a prohibition of a *reversal of the burden of proof* and adopted on first reading by the Drafting Committee.[32] The provision thus stated: "not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal."[33] While art. 67(1)(i) was adopted, art. 69(7) remained listed as "pending"[34] until July 11, 1998, when the Working Group stated that art. 69(7) was "deleted."[35]

18. The preparatory work records do not include any information that clarifies what prompted the decision in 1998 to delete art. 69(7), which would have placed a burden of proof on the accused

[25] "The accused shall have the right to plead defences to trial under the provisions of this Statute, and to present evidence in their support." *Proposal Submitted by Colombia, article 69, paragraph 7*, A/CONF.183/C.1/WGPM/L.25 (Jun. 25, 1998).
[26] "Where a defence is not already raised by the evidence presented to the Court, the accused may raise such a defence and has the right to prove such a defence." *Proposal Submitted by Canada for article 69, paragraph 7*, A/CONF.183/C.1/WGPM/L.26 (Jun. 26, 1998).
[27] "The onus is on the Prosecutor to establish the guilt of the accused beyond a reasonable doubt. With regard to defences open to the accused under the general principles of criminal law in the Statute, the onus of proof shall be on the accused." *Proposition Presentee par L'Iraq pour l'article 69, paragraphe 7*, A/CONF.183/C.1/WGPM/L.24 (Jun. 26, 1998).
[28] "The accused shall have the burden of proof in availing himself of the defences in his or her favour under the general principles of criminal law in the present Statute, subject to the requirements of article 66." *Proposal Submitted by the Philippines for article 69, paragraph 7*, A/CONF.183/C.1/WGPM/L.27 (Jun. 26, 1998).
[29] United Nations, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* [hereinafter, "UN Plenipotentiaries"], Vol. III, A/CONF.183/13, at 307 (Jun. 15–Jul. 17, 1998).
[30] UN Plenipotentiaries, Vol. III, A/CONF.183/13, at 307 (Jun. 15–Jul. 17, 1998).
[31] UN Plenipotentiaries, Vol. III, A/CONF.183/13, at 295 (Jun. 15–Jul. 17, 1998).
[32] *Draft Proposal for Article 67 Submitted by the Chairman, Rights of the Accused*, A/CONF.183/C.1/WGPM/L.42 (Jul. 2, 1998); UN Plenipotentiaries, *Texts Adopted on First Reading, Article 67, Rights of the Accused*, A/CONF.183/DC/R.109 (Jul. 8, 1998).
[33] UN Plenipotentiaries, *Texts Adopted on First Reading, Article 67, Rights of the Accused*, A/CONF.183/DC/R.109, at 1–2 (Jul. 8, 1998).
[34] UN Plenipotentiaries, *Compendium of Draft Articles Referred to the Drafting Committee by the Committee of the Whole as of 9 July 1998*, A/CONF.183/C.1/L.58, at 42 (Jul. 9, 1998).
[35] UN Plenipotentiaries, Vol. III, A/CONF.183/13, at 278 (Jun. 15–Jul. 17, 1998).

as to affirmative defences, and maintain art. 67(1)(i), the ban on a reverse onus. The only source addressing this issue is Hakan Friman,[36] who reported that this decision to omit art. 69(7) was prompted by South Africa's constitutional constraints, which at the time precluded placing any burden of proof on the accused even as to affirmative defences.[37]

19. While there is nothing in the official negotiating record confirming Friman's recollection, it is a fact that art. 69(7) was deleted and art. 67(1)(i) was written into the final text. The adoption of art. 67(1)(i) posed no problems during the debates in Rome and was adopted promptly,[38] suggesting overall agreement among drafters of an approach intended to afford greater protections to the accused.

20. The drafters' strict approach to the burden of proof is consistent with other provisions included in the Rome Statute to address concerns of excessive and unwarranted prosecutions unique to a Court with potential worldwide jurisdiction.[39] For example, art. 22(2), *nullum crimen sine lege*, provides that "the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." The Statutes of the ad hoc tribunals do not contain an equivalent provision. In addition, the language of art. 8 of the Rome Statute states that the Court shall focus, in particular, on the prosecution of war crimes that are part of a "plan or policy" or are "large scale"—language suggesting a heightened threshold that is not in the Statutes of the ad hoc tribunals or form part of customary international law. This is the context in which the Appeals Chamber should understand the negotiating record and selection of the wording of art. 67(1)(i),

[36] Friman was a former member of the Swedish Delegation to the ICC who played a prominent role in the drafting and adoption of the Rome Statute and RPE.

[37] Hakan Friman, *Inspiration from the International Criminal Tribunals When Developing Law on Evidence for the International Criminal Court,* 3 Law Pract. Int. Court. 373, 381 (2003). S v. Zuma, 1995 (2) SA 642 (CC) at 37 ¶ 39 (S. Afr.) (holding that the South African constitution prohibits a reversal of the burden of proof); MH Mthembu, *The constitutionality of presumptions in South African law*, 31 Comp. Int'l L. J. S. Afr. 213, 223 (1998). *But see* Criminal Procedure Act (Amended) Act. 51 of 1997 art. 78 (1B) (S. Afr.) ("Whenever the criminal responsibility of an accused with reference to the commission of an act or an omission which constitutes an offence is in issue, the burden of proof with reference to the criminal responsibility of the accused shall be on the party who raises the issue."). This provision was adopted in October 1998, whereas the Rome Statute was adopted in July 1998.

[38] *Draft Proposal for Article 67 Submitted by the Chairman, Rights of the Accused*, A/CONF.183/C.1/WGPM/L.42 (Jul. 3, 1998); UN Plenipotentiaries, *Texts Adopted on First Reading, Article 67, Rights of the Accused,* A/CONF.183/DC/R.109 (Jul. 8, 1998).

[39] Testimony of David Scheffer, Ambassador at Large for War Crimes Issues, Before the Senate Foreign Relations Committee, July 23, 1998 ("The U.S. delegation certainly reduced exposure to unwarranted prosecutions by the international court through our successful efforts to build into the treaty a range of safeguards that will benefit not only us but also our friends and allies."). Further, in July 1998, Ireland, New Zealand, and Argentina explicitly called for the highest standards with respect to the rights of the accused and fair trial. *See* UN Plenipotentiaries, *Summary Record of 6th Plenary Meeting 17 June 1998*, A/CONF.183/SR.6 (Jun. 17, 1998).

which provides the accused the right "not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal."

21. In conclusion, the negotiating history of art. 67(1)(i) evinces that the drafters *considered* the adoption of the Burden Shifting Approach in relation to grounds excluding criminal responsibility, but eventually rejected this proposal in favour of an absolute prohibition on any reversal of the burden of proof by adopting art. 67(1)(i).

IV. ICTY precedent is not persuasive on the issue of burden of proof related to defences

22. The case law of the ICTY suggests that the Tribunal followed the Burden Shifting Approach, placing the burden of proof on the accused to prove the existence of defences. In *Celebici*, the ICTY Trial Chamber stated that "the burden of proof of facts relating to a particular peculiar knowledge is on the person with such knowledge or one who raises the defence."[40] The ICTY Appeals Chamber opined that the appropriate standard of proof placed on the accused in such a case was the "balance of probabilities."[41] While the ICC drafters considered the ICTY jurisprudence when drafting the Rome Statute, and it continues to serve as an important tool in the interpretation of many (but not all)[42] of the provisions of the Rome Statute and RPE, the ICTY precedent does not serve as persuasive authority on the issue of the burden of proof and appropriate standard of proof in relation to the grounds excluding criminal responsibility enshrined in art. 31. Art. 67(1)(i), which prohibits the reversal of the burden of proof, is a "novel provision" with no equivalent counterpart in the Statute of the ICTY.[43] By adopting arts. 66(2) and 67(1)(i), the drafters of the Rome Statute intentionally took a different approach to the burden of proof regarding defences than that applied at the ICTY or in certain national jurisdictions.[44] As a result, the combined effect of arts. 66(2) and 67(1)(i) renders the ICTY approach incompatible with the ICC context.[45]

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[40] Prosecutor v. Delalic (Celebici), Case No. IT-96-21, Trial Chamber Judgement, ¶¶ 78, 603, 1157–60 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); *See also* Prosecutor v. Delalic, Case No. IT-96-21-A, Appeals Chamber Judgement, ¶¶ 582, 590 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 21, 2001).

[41] Prosecutor v. Delalic, Case No. IT-96-21-A, Appeals Chamber Judgement, ¶¶ 582, 590 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 21, 2001). *See also* ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, 418 (2019).

[42] "Joint Criminal Enterprise" responsibility, circumscribed in art. 25(3)(d) of the Rome Statute, is yet another example of where the drafters of the ICC explicitly decided to depart from the approach of the ICTY.

[43] Göran Sluiter et al., *Principles and Rules*, *in* INTERNATIONAL CRIMINAL PROCEDURE 69 (2013).

[44] Mark Klamberg, *Commentary on the Law of the ICC*, 482 (2017). *See also* William A. Schabas, *An Introduction to the ICC*, 240 (2011); Mark Klamberg, *Burden of Proof, Standard of Proof and Evaluation of Evidence*, *in* EVIDENCE IN INTERNATIONAL CRIMINAL TRIALS, 126–27 (2013).

[45] Note that there is no provision equivalent to art. 67(1)(i) of the ICC Statute in the ICTY Statute.

V. The ICTY erred in *Celebici* in describing the Burden Shifting Approach as a "general principle of law," given the divergent approaches amongst national systems

23. While the *Celebici* Trial Judgment cited to several jurisdictions that placed the burden of proof for establishing affirmative defences on the accused,[46] this approach is by no means settled or sufficiently uniform to constitute a "general principle."[47] A general principle is a term of art referring to principles of fairness and justice common to most domestic legal systems.[48]

24. On the contrary, there is no uniform state practice in respect of the allocation of the burden or standard of proof for the defences of mental disease or defect or duress. Though the *Celebici* Trial Chamber relied heavily on English law to support its view that the Burden Shifting Approach was a "general principle of law," the English approach with respect to burden of proof for the insanity defence—which has remained largely unchanged since the *M'Naghten* case of 1843[49]—has been characterized by the English Law Commission as nothing more than a "historical accident."[50] In a 2013 report, the Commission advocated for adoption of the Evidentiary Production Approach,

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[46] Under the English insanity defence, it is widely accepted that the burden is on the accused to prove lack of sanity on the balance of probabilities. M'Naghten's Case (1843) 8 Eng. Rep. 718, 719. *Accord* R v. DPP, ex parte Kebilene (2000) 2 A.C. 326, 377 (Lord Hope of Craighead op.) (noting that, while generally, the accused merely has an evidentiary burden when raising affirmative defences, with the burden of proof remaining on the prosecution, the insanity defence is an exception to this rule). The *Celebici* Trial Chamber heavily relied on the Burden Shifting Approach as articulated in the English Homicide Act, which distilled and codified the approach as characterized in *M'Naghten*. English Homicide Act 1957, 5 & 6 Eliz. 2 c. 11 § 2. Note that South Africa enacted a law subsequent to the conclusion of the Rome Statute that adopts a different approach than prevailed in South Africa at the time the ICC Statute was negotiated. *See supra*, at fn 37.

[47] IMOGEN SAUNDERS, GENERAL PRINCIPLES AS A SOURCE OF INTERNATIONAL LAW 277–300 (2021).

[48] This understanding of the phrase is confirmed by usage at the ICJ. The summary records of the debates in the Advisory Committee of Jurists, which led to the adoption of art. 38 of the ICJ Statute, suggests that "the general principles referred to . . . were those which were accepted by all nations *in foro domestico*, such as certain principles of procedure, the principle of good faith, the principle of res judicata, etc." Advisory Committee of Jurists, *Procès-verbaux of the proceedings of the Committee: Jun. 16–Jul. 24, 1920, with Annexes*, P.C.I.J., 335. The ICJ's application of "general principles" in its case law confirms this understanding. For instance, in the South West Africa cases the Court excluded the existence of a principle granting a right for any member of a community "to take legal action in vindication of a public interest," noting that ". . . although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present; nor is the Court able to regard it as imported by the 'general principles of law' referred to in Article 38(1)(c), of its Statute." South West Africa (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase) I.C.J. Rep. 1966 (Jul. 18), 6, 47, ¶ 88. In contrast, in the Corfu Channel case the Court considered that allowing a State "more liberal recourse to inference of fact and circumstantial evidence" when seeking to prove an event that occurred in an area subject to the exclusive territorial control of another State was allowable as a general principle of law because such indirect evidence was "admitted in all systems of law, and its use . . . recognized by international decisions." Corfu Channel (UK v. Albania), Merits, I.C.J. Rep. 1949 (Apr. 9) 4, 18. The term has never been specifically defined by the ICC, nor has the Court explicitly deviated from the ICJ's understanding of the term.

[49] M'Naghten's Case (1843) 8 Eng. Rep. 718, 719.

[50] Law Commission of England and Wales, *Criminal Liability: Insanity and Automatism*, ¶ 8.22 (Jul. 23, 2013), https://www.lawcom.gov.uk/project/insanity-and-automatism/. *See also* Paul Roberts, *Taking the Burden of Proof Seriously*, CRIM. L. REV., 1995, at 783, 789.

noting, "[i]t is not necessary for the accused to bear the burden of proving a defence based on his or her mental (or physical) condition; justice can be served by an evidential burden on the defence."[51] Indeed, in the case of English law, the plea of insanity is an exception among other affirmative defences, such as duress, in which the initial evidentiary burden—but not the ultimate persuasive burden—is placed on the defendant.[52]

25. In addition, a number of civil law jurisdictions[53] do not engage in adversarial burden shifting; rather, they adopt the Free Assessment Approach. This approach mandates court-ordered investigations into the issue of mental disease or defect or duress. In such jurisdictions, the notions of "affirmative defence" or "burden shifting" do not exist.[54]

26. A number of jurisdictions from every continent support the Evidentiary Production Approach as part of a strict interpretation of the presumption of innocence.[55] Some states disallow the burden

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[51] Law Commission of England and Wales, *Criminal Liability: Insanity and Automatism*, ¶ 8.43 (Jul. 23, 2013), https://www.lawcom.gov.uk/project/insanity-and-automatism/.

[52] Code for Crown Prosecutors, *Defences – Duress and Necessity* (Oct. 19, 2018) ("[O]nce the defendant has raised sufficient evidence of duress to allow it to be considered by the magistrates/district judge/jury, the legal burden then falls upon the prosecution to prove beyond reasonable doubt that the defendant was not acting under duress."), https://www.cps.gov.uk/legalguidance/defences-duress-and-necessity; Mark Lucraft, *The Mental Element in Crime*, *in* ARCHBOLD CRIMINAL PLEADING EVIDENCE AND PRACTICE 2022, 17–114 (2021).

[53] *E.g.*, Germany, Cyprus, Austria, and Greece. For a discussion of these approaches, *see infra*, at fn 54.

[54] Even among jurisdictions which employ the Free Assessment Approach, there is a varying degree of reliance on the court to direct such inquiries. For instance, in Cyprus, criminal procedure dictates that the court directs inquiries with respect to the existence of mental disease or defect. CYPRUS CRIMINAL PROCEDURE RULES (1959) Ch. 155, art. 70(1). In contrast, German, Greek, and Austrian approaches place equal responsibility on the court and the prosecution to establish any exculpatory facts, including grounds for excluding criminal responsibility. KODIKAS POINIKES DIKONOMIAS [KPOL.D.] [CODE OF CRIMINAL PROCEDURE] (1950) art. 178(2) (Greece) (noting that "the accused shall not be obliged to adduce evidence of the facts relied on in his favour," since the court and prosecution have the full duty to investigate, adduce and examine all evidence establishing the innocence or guilt of the accused); STRAFPROZEßORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE] Bundesgesetzblatt [BGBI] No. 631/1975, as amended, ¶ 3(1)–(2) (Austria) (it is the duty of the police, prosecution, and the courts to establish *ex officio* all relevant facts, including grounds excluding criminal responsibility); *see also* Oberster Gerichtshof [OGH] [Supreme Court] Dec. 19, 1979, 12 Os 53/79 EVIDENZBLATT DER RECHTSMITTELENTSCHEIDUNGEN [EVBL] 1980/116, 355 (Austria); Oberster Gerichtshof [OGH] [Supreme Court] Nov. 26, 1992, 15 Os 42/92, JURISTISCHE BLÄTTER (JBL), 345 (Austria). In Germany, it is also the responsibility of the court and the prosecutor to provide evidence both against and in favour of the accused. The burden of proof for exculpatory circumstances is not upon the accused; if the accused raises any colourable defence, the prosecutor must prove the contrary to the satisfaction of the court. STRAFGESETZBUCH [StGB] [CRIMINAL CODE] Nov. 13, 1998, para. 21 (Ger.)., Diminished responsibility; *see also* Hans-Heinrich Jescheck, *Principles of German Criminal Procedure in Comparison with American Law*, 56 VA. L. REV. 239 (1970). In practice, the Defence must also be able to substantiate their claim of extenuating circumstances. Though the Prosecution is legally bound to investigate in favor of the accused, the accused still has the burden of asserting facts (Darlegungslast), similar to the obligation for the accused to adduce evidence under the Evidentiary Production Approach.

[55] *E.g.*, Jordan, Azerbaijan, the Philippines, Russia, as well as at least five of the United States: Colorado, Massachusetts, Mississippi, Oklahoma, and West Virginia. JORDANIAN CODE OF CRIMINAL PROCEDURE (1961), art. 147(1)); CODE OF CRIMINAL PROCEDURE OF THE REPUBLIC OF AZERBAIJAN (2000), art. 21 ¶ 3 "Presumption of Innocence" ("The accused shall not be obliged to prove his innocence. It shall be for the Prosecution to prove the charge or to refute the evidence given in defence of the suspect or the accused.")); Patula v. People, G.R. No. 164457,

to shift to the accused on the issue of mental disease or defect, despite provisions in their criminal code establishing a presumption of sanity.[56]

27. Further, divergence exists within national jurisdictions in respect of the allocation of the burden or standard of proof for the defences of mental disease or defect or duress as well.[57]

VI. The Evidentiary Production Approach provides the Court with a coherent framework, enabling the Appeals Chamber to provide clear guidance on the application of arts. 31(1), 66 and 67(1)(i) of the Rome Statute and rule 79(1)(b) of the RPE

28. Providing clear guidance on the application of arts. 31(1), 66 and 67(1)(i) of the Rome Statute and rule 79(1)(b) of the RPE will help bolster public perceptions of justice and confidence in the Court. In contrast, continuing controversy about the sanity of Nuremberg accused Rudolf Hess,[58]

685 Phil. Rep. 376–411 (Apr. 11, 2012) (". . . the weakness of the defence put up by the accused is inconsequential in the proceedings for as long as the Prosecution has not discharged its burden of proof in establishing the commission of the crime charged and in identifying the accused as the malefactor responsible for it."); UGOLOVNYI KODEKS ROSSIISKOI FEDERATSH [UK RF] [Criminal Code] (2001), art. 14(2)–(3) (Russ.); COLO. REV. STAT. ANN. § 16-8-105.5(2) (West 2019); Commonwealth v. Dunphe, 485 Mass. 871, 878–79 (2020); Hawthorne v. State, 883 So. 2d 86, 89 (Miss. 2004); Ake v. State, 663 P.2d 1, 10, rev'd on other grounds, 470 U.S. 68 (1985); Rogers v. State, 634 P.2d 743, 744 (Okla. Crim. App. 1981); Edwards v. Leverette, 258 S.E.2d 436, 439–40 (W. Va. 1979); *accord* State v. Boyd, 280 S.E.2d 669, 686 (W. Va. 1981). While not completely analogous, the Slovak Republic and the Czech Republic treat mental disease and defect and duress as grounds excluding criminal responsibility and therefore require the accused to investigate this issue as part of the case. These states take a hybrid approach in that, like other Free Assessment jurisdictions, they do not establish formal burden-of-proof in criminal proceedings. However, unlike most Free Assessment jurisdictions, and like other Evidentiary Production jurisdictions, the court is not obligated to procure or supplement evidence which the parties themselves have not put forth. (*See* Slovak Supreme Court, Judgment of Apr. 2, 2014: Law No. 301/2005 ("Taking of evidence in court proceedings, which the parties have not proposed or secured, is, under the current legislation, a possibility, but no longer an obligation, of the court."). *See also* Slovak Supreme Court, Judgment no. 1 Tost 18/2014 of May 28, 2014.

[56] *E.g.*, The courts in the Kingdom of Jordan generally accept that the burden of proof in criminal proceedings rests on the prosecution as a corollary to the presumption of innocence enshrined in art. 147(1) of the Jordanian Code of Criminal Procedure. The burden does not shift to the accused in the context of the affirmative defence of insanity, despite the presumption of sanity established in art. 91 of the Jordanian Code of Criminal Procedure. A. Abel Rahman Youssef Hassan, The Role of Modern Scientific Evidences in Proven Crimes, 30 (2012) (unpublished M.A. thesis, Middle East University).

[57] *E.g.*, although the federal standard in the United States for both mental disease and defect and duress places the burden of proof of those defences on the defendant, *see* Comprehensive Crime Control Act 18 U.S.C. § 17 (1984) (overruling Davis v. United States, 160 U.S. 469 (1895)); Dixon v. United States, 548 U.S. 1 (2006), there is a variance in approaches taken at the state level. While a majority of states place some burden of proof on the Defendant to prove insanity, at least five states do not shift the burden of proof to the Defendant to prove the defence: Colorado, Massachusetts, Mississippi, Oklahoma, and West Virginia. *See supra*, at fn 55.

[58] Phillip L. Weiner, *Fitness Hearings in War Crimes Cases: From Nuremberg to the Hague*, 30 B.C. INT'L & COMP. L. REV. 185, 192 (2007) ("The issue of Rudolph Hess's competency remains controversial. In fact, the Assistant of Chief Counsel, Telford Taylor, who observed Hess during trial, did not believe that he was fit to stand trial.") (*citing* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 179 (1992)).

weakened the moral messaging of the Nuremberg Tribunal.[59] One of the criticisms of the Tribunal was its failure to establish a clear burden of proof or evidentiary standards for evaluating competence to stand trial.[60]

29. In the present case, both the Defence and Prosecution presented expert witnesses and evidence on the issues of the accused's mental disease or defect and duress. In relation to mental disease or defect, the ICC Trial Chamber gave clear reasons indicating why the evidence put forward by the Defence was unreliable.[61] As to duress, the Trial Chamber also analysed why the evidence adduced by the Defence was insufficient to support their claims, when read in a larger context.[62] The

[59] Despite serious questions about Hess's capacity to stand trial, Hess was ultimately convicted, sentenced, and years later committed suicide in prison. The court's decision remains controversial. *See* Merrell Frazer Jr., *Twilight of Nazism: The Controvertible Case of Rudolf Hess and the Law*, 11 INT'L LAWYER 729, 732 (1977) ("Rudolf Hess was denied a fair trial . . . he was mentally unable to stand trial and neither assisted his defence counsel nor testified in his own behalf . . . That Hess suffered from mental aberrations and was, and in fact adjudged a paranoiac-schizoid, that he suffered from amnesia and delusions of grandeur, and that he was found mentally unable to understand or comprehend the proceedings against him were medically documented facts available at the Nuremberg trial."); Keith Moore, *Rudolf Hess: Inside the Mind of Hitler's Deputy*, BBC (Apr. 9, 2012), https://www.bbc.com/news/magazine-17588632 (stating that many questioned Hess' sanity during the Nuremberg trial and Winston Churchill later said he believed Hess was a medical case not a criminal).

[60] Phillip L. Weiner, *Fitness Hearings in War Crimes Cases: From Nuremberg to the Hague*, 30 B.C. INT'L & COMP. L. REV. 193–98 (2007).

[61] With respect to the issue of mental disease or defect, the Trial Chambers took the Free Assessment Approach, indicating that the onus was on the Court to determine the sanity of the accused as a legal matter. Prosecutor v. Dominic Ongwen, ICC-02/04-01/15-1762-Red, Trial Judgment [hereinafter, "Ongwen Trial Judgment"], ¶ 2456 (Feb. 2, 2021). The Defence presented the expert evidence of two psychiatrists, Dr. Dickens Akena and Prof. Emilio Ovuga, while the Prosecution presented the expert evidence of two psychiatrists, Dr. Gillian Mezey and Dr. Catherine Abbo and psychologist, Prof. Roland Weierstall-Pust, who also testified as its rebuttal witness. The Trial Chamber also appointed an expert psychiatrist, Prof. Joop T. de Jong, who submitted an expert report. *See* Ongwen Trial Judgment, ¶ 885. The Trial Chamber regarded the evidence put forward by the Defence experts to be unreliable and therefore deferred heavily to the reports and testimony provided by the Prosecution's experts, as well as the court-appointed psychiatrist. Ongwen Trial Judgment, ¶ 2500 (failure to consider corroborating evidence); ¶ 2527 (unreliability of methodology employed); ¶ 2528 (the blurring of the Defence experts' roles as treating physicians and forensic experts); ¶ 2573 (failure to focus on Ongwen's mental health during the time of the relevant conduct); ¶ 2580 (conclusion); *see generally* Ongwen Trial Judgment, ¶¶ 2457–2580.

[62] On the issue of duress, the Trial Chamber points to the fact that the ultimate burden of proof for the case is on the Prosecution without explaining the approach that it was taking in its analysis of the evidence. Ongwen Trial Judgment, ¶ 2588. The Defence argued that, among other facts, the defence of duress was met because of Dominic Ongwen's experiences as a child soldier (*see* Defence Closing Brief, ¶ 682); a climate amongst the LRA of "an unquestionable obligation to follow Kony's orders, failure of which would result into death" (Defence Closing Brief, ¶ 684); the existence of "omnipresent surveillance by selected individuals within the LRA, who reported to Kony" (Defence Closing Brief, ¶ 691); and the fact of Ongwen's arrest in April 2003 (Defence Closing Brief, ¶ 714, n. 1182; D-0013: T-244, at 3, line 19–54, line 16). The Trial Chamber addresses these assertions in turn, explaining why, taken in context with the facts and testimony supplied by the Prosecution and addressing gaps in evidence to support the claims made, the evidence is insufficient to establish a finding of duress. Ongwen Trial Judgment, ¶¶ 2669–72 (on Ongwen's experiences as a child soldier); ¶¶ 2620 & 2627 (on the climate among the LRA of unquestionable obligation to follow orders at risk of death); and ¶¶ 2619–20 (on Ongwen's arrest); *see also* Ongwen Trial Judgment, ¶¶ 2666–67 (regarding acts committed in private where any duress would not be relevant); ¶¶ 2624–27 and 2628–29 (regarding successful escapes of senior LRA members); ¶¶ 2636–38 and 2640–41 (regarding an opportunity to surrender); ¶ 871 (regarding testimony that "some people could violate orders," and that Ongwen was a commander who would obey,

outcome of the case would not be different had the Trial Chamber explicitly applied the Evidentiary Production Approach that PILPG proposes. Under the Evidentiary Production Approach, the Trial Chamber would, however, have framed its analysis differently by addressing two questions. First, does the evidence raised by the accused create a live issue? Consistent with the practice of jurisdictions that apply the Evidentiary Production Approach, the initial threshold for the accused is low, comparable to a prima facie case. Second, if a live issue is before the court, has the Prosecution satisfied its burden; namely proving that the evidence presented by the accused does not create a reasonable doubt as to the accused's guilt? This approach is consistent with the plain meaning of the provisions in the Rome Statute and RPE, and the negotiating history. It provides the Court with a coherent framework for determining whether the Prosecution has satisfied its burden, enabling the Appeals Chamber to provide clear direction as to the methodology and the application of law to the facts so that Trial Chambers—now and in the future—can apply standards consistently across the entirety of art. 31.

VII. Summary Conclusions

30. PILPG submits that the accused bears the initial evidentiary burden to raise an art. 31(1) ground; that is, to adduce sufficient evidence to establish the existence of mental disease or defect or duress. The Prosecution thereafter bears the burden of proof; that is, to prove that the evidence adduced by the accused in relation to the art. 31(1) ground does not establish a reasonable doubt as to the accused's guilt, consistent with art. 66(2)–(3).

Respectfully submitted for the Public International Law & Policy Group:

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as "indicative of the fact that the high commanders of the LRA had a considerable degree of choice and independence"); ¶¶ 872 (regarding testimony that Ongwen "would not just engage in something without being sure" and that LRA "commanders display[ed] a considerable degree of initiative"); ¶¶ 1001–04 (regarding a comparison of the lack of outside information that lower-ranking LRA members could access with the greater degree that commanders could access, observing that "the evidence demonstrates that commanders generally had the ability to and did listen to public radio"); *see generally* Ongwen Trial Judgment, ¶¶ 2589–2672.